June 3, 2016

Jennifer Shasky Calvery
Director
Financial Crimes Enforcement Network
U.S. Department of Treasury
P.O. Box 39
Vienna, VA 22183

Via Regulations.gov

Re: Docket Number FINCEN–2014–0005 Amendments to the Definition of Broker or Dealer in Securities RIN 1506–AB29

Dear Ms. Calvery:

I am writing to comment on the Financial Crimes Enforcement Network (FinCEN) proposed rule entitled "Amendments to the Definition of Broker or Dealer in Securities."[1]

In its Regulatory Flexibility Act analysis, FinCEN states that "FinCEN believes that there are no Federal rules that duplicate, overlap, or conflict with the proposed regulations or the proposed amendments."[2] This is simply not the case. In fact, in three decades of reading and commenting on Treasury proposed rules I have never seen a more obvious case of a duplicate, overlapping and unnecessary rule.

Funding portals do not handle customer funds. The JOBS Act[3] prohibits them from doing so.[4] The banks and broker-dealers that do handle customer funds must comply with AML/KYC rules. Thus, the proposed rules quite literally impose duplicative and overlapping requirements. They require both the financial institution holding customer funds and the funding portal which cannot hold customer funds to perform the same function twice with respect to the same customer funds.

It is inappropriate to require funding portals to comply with these rules because the ability of the funding portal to engage in, or facilitate, money laundering does not exist to any meaningful degree and the costs of complying with these rules are likely to be so high as to make funding portals uneconomic. It will result in a situation where the only intermediaries are broker-dealers. It will frustrate the intention of Congress to establish a more lightly regulated intermediary class.

It is instructive that FinCEN in its entire discussion gives no examples of where a funding portal that is prohibited from holding customer funds would serve a function not performed by the bank or broker-dealer that does hold the customer funds at issue.

FinCEN states that "FinCEN believes that funding portals could play a critical role in detecting, preventing, and reporting money laundering and other illicit financing, such as market manipulation and fraud."[5]

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[1] *Federal Register*. Vol. 81, No. 64, April 4, 2016, p. 19086-19094.
[2] *Federal Register*. Vol. 81, No. 64, April 4, 2016, section VII.4, p. 19093.
[3] Public Law 112–106, April 5, 2012.
[4] Securities Act §4(b)(2)(B).
[5] *Federal Register*. Vol. 81, No. 64, April 4, 2016, p. 19088.

There are laws prohibiting market manipulation and fraud, notably the Securities Act and the Securities Exchange Act enforced by the Securities and Exchange Commission and the various state blue sky laws and state securities law agencies that enforce those laws. Moreover, the JOBS Act (which amended the Securities Act) imposes a wide variety of due diligence requirements on funding portals designed to combat fraud. The Bank Secrecy Act is not designed to prevent market manipulation and fraud and it is not meant to do so. That is the job of securities regulators. There is no reason to believe that FinCen has any particular aptitude at performing this function.

FinCen writes "As this is a new requirement, the estimated average burden associated with the recordkeeping requirement in this proposed rule is three hours for development of a written program. A one hour per year burden is recognized for annual maintenance and update."[6]

This estimate simply cannot be taken seriously by anyone familiar with AML/KYC compliance. One cannot even read the applicable rules in three hours, let alone absorb their requirements, write a plan, implement it and then ensure compliance. These rules are extremely complex and expensive to comply with. There are serious civil and criminal consequences for non-compliance. Undoubtedly, many funding portals that would comply would outsource this work to outside consultants rather than attempt to comply with labyrinth of AML rules. These consultants are expensive. But merely identifying, engaging and dealing with these consultants will take more than three hours and one hour annually. Training staff in AML/KYC compliance will take many hours. And doing the AML/KYC compliance and documenting this compliance to the satisfaction of FinCEN will take even more time.

FINRA and the SEC both originally proposed requiring funding portals to comply with the AML rules.[7] Both revised the proposed rules to eliminate this duplicative and overlapping requirement, a requirement that would almost certainly destroy non broker-dealer funding portals due to the very large compliance costs associated with AML compliance.

Sincerely,

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[6] *Federal Register*. Vol. 81, No. 64, April 4, 2016, p. 19094.
[7] Regulatory Notice 13-34, "FINRA Requests Comment on Proposed Funding Portal Rules and Related Forms," October, 2013; Proposed Rules, "Crowdfunding," *Federal Register*, Vol. 78, No. 214, November 5, 2013, p. 66428, Release Nos. 33-9470 and 34-70741, File No. S7-09-13.